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In the

Supreme Court of the United States

October Term, 1956

No. [redacted] 247

BRITISH TRANSPORT COMMISSION, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA, ETC.,
Respondent

Brief in Opposition to Petition for a Writ of Certiorari, on Question of Cross-Libels

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The ruling of the Court of Appeals in the instant case on the question of cross-claims between co-claimants is completely in accord with established practice and need not be reviewed by this Court. It has within the past two months been approved by the Court of Appeals for the Second Circuit. *Moore-McCormack Lines, Inc. v. McMahon*, ... F. 2d ..... (Docket 23960).

This Court has for many years spoken of the procedure under the limitation statutes as a settlement of a many cornered controversy. *The City of Norwich*, 118 U. S. 468. Historically the purpose of the statutes was to limit the potential losses of the enterprising ship owner to the amount at stake, the vessel and her freight. The procedure to be

followed by the Courts was not set out by Congress except for the provision that limitation would be by "appropriate proceedings." This Court in 1872 published Admiralty Rules numbered 54, 55, 56 and 57 which were amended in 1920 to become Rules numbered 51, 52, 53 and 54, and which today are the same. The statutes have been liberally construed from time to time by this Court to carry out the broad principles declared by Mr. Chief Justice Taft in *Hartford Accident & Indemnity Co.* v. *Southern Pacific Railroad Company*, 273 U. S. 207, of disposing of all sides of a multi-cornered dispute in an equitable manner.

It must not be forgotten, however, that limitation or exoneration is merely a statutory defense raised by the ship owner which may grant him partial or complete relief from all of his debts. In the same way the bankruptcy court grants relief to the debtor by marshalling all of his assets, paying off his debts to the limit of his assets and within certain limits relieving him of any further claims on the past indebtedness. *Hartford Accident & Indemnity Co.* v. *Southern Pacific Railroad Company, supra.*

The fact remains that each claim in the limitation proceeding is brought as a libel would be brought and each claimant has the same standing as any other libellant and is therefore subject to the same responsibilities as any other libellant who sues jointly or whose suit is consolidated with that of others because arising from the same state of facts. *The Steel Inventor* (CCA 2d, 24 F. 2d 657), cert. den. *sub nomine Bell* v. *U. S. Steel Products Co.*, 283 U. S. 819.

A petition for limitation may be sought either before or after libels have been filed against the vessel owner. In the instant case a petition for limitation was filed before any libels were filed. If on the other hand the British Ministry

of Transport or any other claimant had filed a libel in the District where the vessel was found, which could readily have been done, the present confusion over the question of cross-libels would not have occurred. It appears clear that the learned District Judge as well as the Court of Appeals for the Fifth Circuit on whom he relied, see *Department of Highways* v. *Jahncke Service*, 174 F. 2d 894 (1949), failed to make this distinction. The petition for limitation does not change the form of the action which is fundamentally a consolidated suit by various libellants against one respondent. The petition merely sets forth the relief prayed for, namely, limitation of liability. Exoneration as in any answer is also sought. A cross libel may be filed and served on proctors for a cross-respondent. *The Elisa Lines* (CCA), 61 Fed. 308. *Dea* v. *Wrightson*, 26 F. 2d 175, cert. den. 278 U. S. 623. Also see: *Washington Southern Navigation Co.* v. *Baltimore and Philadelphia SS Co.*, 263 U. S. 629. Under Admiralty Rule 56, the many cornered controversy is easily settled in one proceeding. The liberal joinder of actions by the same parties is approved in *Benedict on Admiralty* (6th Edition), Vol. 2 at pages 39-40:

> "While the Supreme Court has left open the general question whether joinder of proceedings is proper, *The Corsair* (1891), 145 U. S. 335, the lower courts have been liberal in sustaining libels which join causes in rem and in personam (citations omitted), as indeed would seem only proper in view of the fact that in many instances the broadest concourse of parties can be compelled by a petition for limitation of liability, embracing causes of action both in rem and in personam, and in view of the further fact that impleader of third parties is freely encouraged under the 56th Rule."

The same reasoning should permit all co-libellants or any other person who is liable for the occurrences in question to be brought in to avoid multiple and costly litigation.

Procedural rules for limitation cases have always been set by this Court ever since *Norwich Transportation Co.* v. *Wright*, 80 U. S. 104. See *The Atlas*, 93 U. S. 302. In most instances this was done without specific instructions from Congress because only the general words "appropriate proceedings" were used in the Statute and this Court has taken on the task of defining the appropriate proceedings. See *The Benefactor*, 103 U. S. 239 (1880) (rule later changed by amendment in 1936 to 48 U. S. C., Sec. 183); *The Scotland*, 105 U. S. 24; *City of Norwich*, 118 U. S. 468 (1885); *La Bourgogne*, 210 U. S. 95 (1908).

In 1889 Supreme Court Rule 57, now Rule 54, was promulgated permitting the shipowner to file an affirmative petition for limitation before any suit was begun against the vessel. This is the procedure followed by the petitioner, the United States in the instant case and is now the customary manner of proceeding although it is still proper to proceed with a petition to limit if brought within six months of notice of the first claim or the filing of the first libel. 48 U. S. C. 183.

The result should be the same in each instance. If a respondent who is libeled can cross-libel before he files a petition for limitation there is no reason why he should not be allowed to do so after or concurrently with his petition for limitation. Equally clear is the right of co-libellants to cross-libel under Rule 56 for damages arising out of the same occurrence or even bring in third parties who are responsible if the basis of the action is the same.

The Court of Appeals for the Fifth Circuit has, we con-

tend, missed the point which has now been set out by the Court of Appeals for the Fourth Circuit in the instant case and the Second Circuit in the *Moore-McCormack Lines, Inc.* v. *McMahon, supra*. In *Department of Highways* v. *Jahncke*, 174 F. 2d 894 (CCA 5th, 1949), the petitioner for limitation sought to implead under Rule 56 a third party alleged to be jointly liable to the claimants. This was denied on the basis of appellee's contention, that a limitation proceeding is a special statutory proceeding not embraced within the language of Rule 56 which specifies that it is applicable only to "a suit in rem or in personam." The court has failed to note that limitation is merely a limit on the remedy in amount together with a concourse of all claims which may be instituted after or before claims or libels are brought. *Black Diamond S.S. Corp.* v. *Robert Stewart & Sons*, 336 U. S. 386. Reliance was placed by the Court on *Poling Bros.*, 1937 A. M. C. 1513 (EDNY) and *Petition of the Texas Company*, 81 F. Supp. 758. In *Poling Bros., supra*, Byers, District Judge, denied the motion of impleader solely on the ground that the issues to be decided on impleader were foreign to the issues already decided on the collision case on the merits. This, of course, is proper under the rule.

In *The Petition of the Texas Company*, 81 F. Supp. 758 (DC EDNY) (1948), Liebell, District Judge, declined to grant process *in rem* and *in personam* to the petitioner against the opposing claimant at that time but stated that petitioner was entitled to an answer to the petition for limitation and that if the vessels were found equally at fault, the claimant would only be entitled to half his damages and the Texas Company, petitioner, could set off by way of contribution, one half of the amount paid to other claimants.

The practical result obviously is the same as if Rule 56 had been followed. As Liebell, J., states at page 762:

> "To permit Verbesky (claimant) to collect on his claim for damage to the *Victory II* in the limitation proceeding, if both vessels were at fault, would not be equitable."

It would be equally inequitable for the *Duke of York*, found solely at fault, to withdraw from the proceedings and avoid all liability in this jurisdiction forcing all claimants to proceed by separate actions long after the collision occurred even though the decision here may be *res adjudicata*. *Algoma Central & Hudson Bay Ry. Co.* v. *Great Lakes Transit Corp.*, 86 F. 2d 708. Learned Hand, C. J., has been quoted in the last case cited to the effect that "At no time can the owner recover a dollar by means of it (the limitation proceeding) from anybody." This is undoubtedly true to the degree stated, namely, that limitation in and of itself is merely a limit to the remedy. In the case of one claimant, it is the same as an affirmative defense either partial or complete, depending on whether limitation or exoneration is allowed. *The Scotland*, *supra*. Furthermore, in the case of multiple claims it is procedural, bringing into concourse all the claims for final adjudication. But limitation *per se* puts no restraint on the petitioner or any of the claimants. Nothing is said in the act which forbids either from suing another party to determine ultimate liability. Once the Court assumes jurisdiction of the collision, the rights of all parties should be determined. *The Steel Inventor*, *supra*.

As stated by Chief Judge Clark in the *Moore-McCormack Lines* case, *supra*, drawing on the authority of *The Steel Inventor*, *supra*:

> "As stated, we think there is authority (to permit cross claims); but in any event, approach to modern admiralty as to modern civil procedure should be to permit convenient practice where we know of no authority that forbids."

Proctors for the Ministry of Transport raise the doubt that when the cross-claims are brought against them, they may not be able to petition for limitation citing *The Algoma* case, *supra*. Hand, J., merely stated that as things then stood, on the record, the Railroad could not petition for limitation because it had not been sued by the opposing petitioner. From there he went on to describe the limitation petition as a defense and a remedy for the concourse of claims for convenient disposition. As far as the petition alone is concerned it seeks no affirmative relief. But there is nothing in the limitation acts to prevent the cross-claims and the Courts have readily given credit for damages in mutual fault cases even where no cross-libel was filed. *The Albert Dumois*, 177 U. S. 240.

The history of Rule 56, previously Rule 59 reveals an equally sound disposition by this Court to employ the rule to do justice under the circumstances. The rule was first promulgated in 1883 apparently to overcome the injustice described by Addison Brown, J., in *The Hudson*, 15 Fed. 162 of a damage claimant arbitrarily suing only one of the vessels involved in a collision. After reviewing the English and American practice, Judge Brown determined that in all justice the respondent vessel owner should be allowed to bring in the other vessel responsible for the collision so that the liability of each could be ascertained at one time. The rule originally referred specifically to collision cases but as

amended has been applied to all cases within the Admiralty jurisdiction. *Aktieselskabet Fido* v. *Lloyd Braziliero*, 283 Fed. 62; *The Alert*, 40 Fed. 836.

Objection has been raised that subjecting the claimant, Ministry of Transport, to cross-claims is unfair and novel. Quite to the contrary as Liebell, District Judge, stated in the *Texas Petition*, *supra*, it is not equitable to allow the claimant to recover in full where both vessels are found at fault.

The Court has in all cases since *The Albert Dumois*, 177 U. S. 240, allowed a reduction in the amount of the claimant's award before limitation is applied where both vessels are held at fault. Thus even though the petitioner makes no cross-claim, he is entitled to a credit for his damages. Furthermore, any damages which are recovered must be added to the limitation fund (*Reynolds* v. *Vanderbilt*, 106 U. S. 47; *Phillip* v. *Clyde Steamship Co.*, 17 F. 2d 250 (CCA 4, 1927). In *Reynolds* v. *Vanderbilt*, *supra*, the English case of *The Seringapatam*, 2 W. Robinson 506 and 3 W. Robinson 38, was discussed with approval leading to the conclusion that the claimant vessel owner seeking damages must give credit for the damages his own vessel causes where both are to blame. In the English case Dr. Lushington put the claimant vessel owner on terms to accept half damages even though the cross-libel of the petitioner had been abandoned because no process was served. (Substituted service on a non-resident's attorney was not permitted until 1859. *The Rougemont* [1893] P. 275.) The justice of such a rule is clearly apparent.

The rule of the Court of Appeals in the instant case and that of the Second Circuit in the *Moore-McCormack Lines, Inc.* v. *McMahon*, *supra*, is clearly the reasonable expression

of the long established tradition of this Court to adopt the procedure which will best give just and equitable results. The petition for writ of certiorari on this question should be denied as not required under the circumstances.

Respectfully submitted,

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